SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY
07/05/2001

*** FILED ***
07/11/2001
CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2000-002068
Docket Code 512 Page 1
FILED: _____

STATE OF ARIZONA
v.
KEITH ALAN CULLERS

GARY L SHUPE

LAURIE A HERMAN

PHX MUNICIPAL CT
REMAND DESK CR-CCC

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This Court has considered and reviewed the record of the proceedings from the Phoenix City Court and the Memorandum from Appellant. This Court has denied Appellee's third request for extension of time to file a responsive Memorandum. This Court notes that Appellee's failure to file a timely memorandum shall not be considered a concession of error.

Appellant was charged with Driving While Under the Influence of Drugs, in violation of A.R.S. Section 28-1381(A)(1), a class 1 misdemeanor. Appellant's jury trial commenced on September 18, 2000. Appellant was convicted of the charge September 19, 2000. Appellant first contends that the trial court erred in denying his Motion for Mistrial. Appellant's counsel objected and moved for mistrial to the testimony by Police Officer Kuhn that the reason he didn't let Appellant go after making a traffic stop was "because he was impaired by something, we didn't know what." R.T. of September 18, 2000 at 52. In an excellent memorandum, Appellant's counsel has cited Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1984). However, subsequent Arizona decisions have noted that Fuenning does not establish a "per se rule" that officer's opinions are never admissible regarding opinions of intoxication or that such opinions would constitute reversible error. State v. Carreon, 151 Ariz. 615, 729 P.2d 969 (App.1986); State v. Borjorquez, 145 Ariz. 501, 702 P.2d 1346 (App.1985). The Borjorquez court correctly notes that Fuenning did not expressly overrule existing case law which specifically permitted opinions by an arresting officer whether the Defendant was intoxicated. Borjorquez, 145 Ariz. at 503.

In the present case, Officer Kuhn did not testify that it was his opinion the Appellant was operating a motor vehicle under the influence of drugs. His testimony was that he believed Appellant was impaired by something. This is important to explain the officer's actions and is not an opinion on an ultimate issue within the jury's province. This Court finds no error in the denial by the trial judge of Appellant's Motion for Mistrial.

Appellant's final argument is that the phrase "or actual physical control" found within A.R.S. Section 28-1381 is unconstitutionally vague. In construing the statute this Court will accord the statute's words their normal common meaning. The words are not confusing. Appellant argues that a person may be prosecuted subject to the whim of the prosecutor. The Court finds Appellant's arguments unpersuasive and that the statute is not void for vagueness.

IT IS ORDERED affirming the judgment of guilt and the sentences imposed by the trial court.

IT IS FURTHER ORDERED remanding this back to the Tempe City Court for further proceedings.